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Supreme Court of the United States

OCTOBER TERM, 1955

No. 643

PAUL DEEMER JOHNSTON AND JOHN SOKOL,
Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 704

UNITED STATES OF AMERICA, Petitioner

v.

DUDLEY A. PATTESON

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT BRIEF FOR PETITIONERS JOHNSTON AND SOKOL AND RESPONDENT PATTESON

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol* is reported

at 227 F. 2d 745. It also appears in the record. [RJ 11][1] The opinion is in the petition for writ of certiorari at pages 19-24. An opinion was written by the District Court. (See *United States* v. *Johnston*, E. D. Pa., 131 F. Supp. 955 (1955).) This opinion appears in the record. [RJ 8] It also appears in the petition for writ of certiorari (No. 643) at pages 25-27.

The opinion of the Court of Appeals for the Tenth Circuit in *United States* v. *Patteson*, Jan. 19, 1956, is not yet reported. It appears in the record. [RP 10-13] It also appears in the petition for writ of certiorari (No. 704) at pages 1a-6a. The opinion of the District Court for the District of Kansas in *United States* v. *Patteson* is reported at 132 F. Supp. 67. It also appears in the record in that case. [RP 6-8]

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit in *United States* v. *Johnston* and *United States* v. *Sokol* was entered on December 1, 1955. [RJ 18, 19] The court extended the time in which to file a petition for rehearing. It was filed in time and denied on January 4, 1956. [RJ 20] A joint petition for writ of certiorari was filed in the *Johnston* and *Sokol* cases on January 26, 1956 (No. 643). This Court granted the writ of certiorari on March 5, 1956.

The judgment of the Court of Appeals for the Tenth Circuit was entered in *United States* v. *Patteson* on January 19, 1956. [RP 13] The petition for writ of certiorari was filed on February 17, 1956 (No. 704). The writ was granted on March 5, 1956.

The jurisdiction of this Court in all three cases is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.)

[1] Numbers herein within brackets preceded by "RJ" refer to pages of printed record in Johnston and Sokol cases (No. 643). Numbers herein within brackets preceded by "RP" refer to pages of printed record in Patteson case (No. 704).

The District Court in each of these cases had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Whether jurisdiction and venue of the crime alleged in each indictment, of refusing, failing or neglecting to obey an order of a local board of the Selective Service System to a conscientious objector to report for civilian work pursuant to Section 6 (j) of the Universal Military Training and Service Act, are fixed in the district where the work was to be performed or in the district where the registrant reported to his local board and there refused to proceed out of the district and to the hospital where he was ordered to perform civilian work.

STATUTE INVOLVED

The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, as amended, 65 Stat. 75, provide:

Section 6 (j) of the Act (50 U. S. C. App. § 456 (j)):

> . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, . . . if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly

> . . failed or neglected to perform a duty required of him under this title. . . .

Section 12 (a) of the Act (50 U. S. C. App. § 462 (a)):

> . . . Any . . . person . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

REGULATIONS INVOLVED

Sections 1660.1, 1660.20, 1660.30 and 1660.31 of the Regulations (32 C. F. R. §§ 1660.1, 1660.20, 1660.30 and 1660.31) are involved. These are extensive provisions which are printed as Appendix A, *infra*, pages 40-45.

STATEMENT OF THE CASES

Petitioners Johnston and Sokol were indicted respectively on May 25, 1954, and July 28, 1954, in the United States District Court for the Eastern District of Pennsylvania. [RJ 3, 4] The indictment in the *Johnston* case charged that he did "knowingly neglect to perform a duty imposed upon him by the provisions of said Act in that he failed and refused to obey an order of Local Board 87, New Castle, Pennsylvania, directing him to report for employment at Norristown State Hospital, Norristown, Pennsylvania, and to remain employed there for twenty-four consecutive months in violation of Title 50, U. S. C. Appx., Sections 456 and 462, as amended." [RJ 4]

The indictment in the *Sokol* case charged that "he failed to report to the Philadelphia State Hospital, Roosevelt Boulevard and Southampton Road, Philadelphia, Pennsyl-

vania, for assignment to perform civilian work contributing to the maintenance of the national health, safety or interest, in lieu of induction; in violation of Title 50 Appx. Secs. 456(j) and 462." [RJ 3-4]

The indictment in the *Patteson* case was returned in the United States District Court for the District of Kansas on October 7, 1954. It charged that he "having registered with Local Board No. 57 for Oklahoma County, Oklahoma, and having been classified by said Board I-O, and the said Board having issued an order, duly mailed to him, for the said Dudley A. Patteson ordering him to report on July 26, 1954, for civilian work contributing to the maintenance of the national health, safety and interest as the said Board deemed appropriate, and he, the said Dudley A. Patteson, did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital at the time and place so designated in said order." [RP 1]

Motions to dismiss the indictments were filed in the *Johnston* and *Sokol* cases on November 5, 1954. [RJ 5] A motion to dismiss was filed in the *Patteson* case May 13, 1955 [RP 3-4] The basis for each motion to dismiss was that the District Court was without jurisdiction to prosecute the offense. [RJ 5; RP 4]

The defendants Johnston and Sokol in the District Court showed that they registered with their local draft boards located in the Western District of Pennsylvania. [RJ 6, 7] Each at all times resided in the Western District of Pennsylvania. [RJ 6, 7] After each man was classified as a conscientious objector the local boards ordered them in the Western District of Pennsylvania to report to them for assignment to civilian work in lieu of induction. [RJ 6, 7] Each man "personally reported to his local board as requested" by the local boards in their orders. [RJ 6, 7] Each man "personally refused to accept" the work ordered to be done by the local boards. Johnston filed a statement with his board that "he could not conscientiously accept the work assigned to him." [RJ 6, 7] Sokol orally informed

his board the grounds for his refusal after reporting. [RJ 6] Both Johnston and Sokol never left the Western District of Pennsylvania or entered the Eastern District of Pennsylvania for the purpose of performing the work assigned to them. [RJ 6,7]

An order was entered by the District Court for the District of Kansas pursuant to Rule 21 (b) of the Federal Rules of Criminal Procedure transferring the *Patteson* case to the Western District of Oklahoma on March 21, 1955. [RP 2] When the case reached the United States District Court for the Western District of Oklahoma, an order was entered by that court transferring the case back to the United States District Court for the District of Kansas. [RP 3]

When the indictment was called for trial in the District of Kansas a motion to dismiss the indictment was made. In that motion it was stated:

> "... He registered under the act with his local board in Oklahoma City. Throughout his entire processing he dealt only with the selective service officials in the State of Oklahoma. He was finally ordered by the Oklahoma City board to perform work at the Topeka State Hospital at Topeka, Kansas. He reported at his local board in Oklahoma City and personally notified the board that he would refuse to accept such employment at the Topeka State Hospital. He never at any time reported at the Topeka State Hospital. He never left the State of Oklahoma or the Western District of Oklahoma to report for the assigned work. The failure to perform the duty that constitutes the offense occurred in the State of Oklahoma. The refusal to report to the hospital was an act that was committed in the Western District of Oklahoma and not in the District of Kansas." [RP 3-4]

The affidavit supporting the motion showed:

> "All of the witnesses that will have to give testimony in the case reside in Oklahoma City. The defendant will be put unjustly to the expense and trouble of getting witnesses brought from Oklahoma City. He may not be able to get his witnesses and evidence ready in time for trial because of the distance and the fact that the witnesses all reside beyond the jurisdiction of this Court. It works a hardship on him to try the case in this Court because he will pay [sic, have] to pay travel fees and other expenses for the attendance of witnesses which will be prohibitive and make it impossible to prove his defenses." [RP 4]

Upon a consideration of the motions to dismiss the indictments each district court sustained the motion to dismiss and the three indictments were ordered dismissed. [RJ 8-9, 10; RP 9] Opinions were written in all three cases giving reasons for the dismissals by the district courts. [RJ 8-9; RP 6-8]

The Government took appeals. In the *Johnston* and *Sokol* cases (No. 643) it appealed to the Third Circuit. In the *Patteson* case (No. 704) it appealed to the Tenth Circuit. The Third Circuit reversed and remanded the judgments dismissing the indictments in the *Johnston* and *Sokol* cases. [RJ 17-19] The Tenth Circuit affirmed the judgment of the District of Kansas ordering the indictment dismissed. [RP 13]. The three cases are now before this Court upon petitions for writs of certiorari which have been granted. [RJ 20; RP 14]

SUMMARY OF ARGUMENT

The offense in each case was committed in the district where the local board was located because it was there that each selectee refused to take the next step in the Selective Service process by proceeding to the hospital and, since no refusal or act of omission or commission was committed by each selectee in the district where the hospital was located, such district in each case did not have jurisdiction because of the mandate of the United States Constitution, Article III, Section 2, and the Sixth Amendment.

The constitutional provisions of Article III and the Sixth Amendment, in fixing venue, base it upon the right of trial by jury. The guarantee of a jury trial intended under the Constitution is nullified if the offense is not tried in the district where the facts occur. It is where the controversy occurs and results in the prosecution that fixes the place of the jury trial.

Grave abuses of the place of criminal trials gave rise to the Revolutionary War. Some of the authors of the provisions of the Constitution had previously declared their grievances in the Declaration of Independence. They emphasized a trial by a jury of the vicinage as a guarantee against the outrages committed against the colonists by the British.—Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197-198, 207-215 (1909); Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944); see also *State* v. *Albee*, 61 N. H. 423 (1881); *Commonwealth* v. *Parker*, 19 Mass. (2 Pick.) 459 (1824).

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol*, 227 F. 2d 745 (Dec. 1, 1955), overlooked the hardship of putting a selectee classified as a conscientious objector to trial at the place of the hospital. Since a conscientious objector on the east coast of the United States under the law may be ordered to work in Alaska or Hawaii, the fixing of jurisdiction in such places

of work manifestly resurrects the condemned practice of transporting citizens to a faraway place for trial, as was done by the British before the Revolutionary War.

The Act and the regulations (50 U. S. C. App. §§ 451-470; 32 C. F. R. § 1602, *et seq.*) definitely distinguish the different offenses that may be committed. It is the defiance of any one of several separate orders that may constitute an offense under the Act. This Court has declared that the entire Selective Service process is a series of separate but connected links in the chain.—*Falbo* v. *United States*, 320 U. S. 549 (1944); *Billings* v. *Truesdell*, 321 U. S. 542 (1944).

The regulations also show that there are several separate acts that a conscientious objector is required to perform in the chain of events beginning with registration and ending with performance of the work at the hospital.—See Part 1660 of the Selective Service Regulations, 32 C. F. R. §§ 1660.1-1660.31.

The refusal on the part of the conscientious objector to perform any one of these acts constitutes an offense. All of the acts required to be performed, except the last one—performance of the work at the hospital—are required to be performed at the place where the local board is located. The act of assignment to the work and the order for performance of it at the hospital begins at the local board. A refusal to take this last step, which begins at the local board, occurs in the district where the local board is located. This dividing line is emphasized by the regulation that provides for the transfer of the file of the registrant from the State Director having jurisdiction over his local board to the State Director having jurisdiction over the place where the work is to be performed.—32 C. F. R. § 1660.31 (a).

The distinction between the offenses committed in these three cases and the offense of leaving the place of employment is emphasized in the policy of the Department of Justice in *Dodez* v. *United States*, 329 U. S. 338 (1946), and

Gibson v. *United States*, 329 U. S. 338 (1946); see also *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947). In the *Dodez* case, *supra*; the registrant wrote the local board a letter stating his refusal to report to the civilian public service camp to do work as a conscientious objector. He was prosecuted in the district where the local board was located. This also happened in *Jeffries* v. *United States*, *supra*, but in the *Gibson* case, *supra*, the prosecution was launched in the district where the camp was located. There Gibson left the camp after reporting and registering in for the work. Under the present act if a registrant classified for performance of military service reports to the local board, but refuses to go forward to the induction station where he has been ordered to submit to induction into the armed forces, the prosecution has always been, and now continues to be, brought by the Government in the district where the local board is located. (*Falbo* v. *United States*, 320 U. S. 549 (1944)) The situation in these three cases is identical to the case of the refusal of the selectee to go forward to the induction station and submit to induction.

The Government undertakes a specious but faulty distinction between the *Dodez* case (329 U.S. 338 (1946)) and these cases. It is argued in the *Dodez* case that the Government paid the expense of travel and, since the registrant had to report to the board to get his transportation ticket, this makes the case different. But venue in these cases is not to be determined according to who pays the travel expense. The same act that fixed jurisdiction under the 1940 law (50 U. S. C. App. §§ 301-318) establishes it under the present Act—50 U. S. C. App. §§ 451-470.

It is the refusal to leave the local board and continue on in the process by beginning and completing the link of travel from the place where the local board is located to the place where the civilian work is to be performed. The refusal to take this integrated step constitutes the dividing line. This nonaction or defiance of the order to take the next step occurs in the district where the local board is located

and not where the hospital is located. The thin veil of who pays the travel expense that the Government wraps around the *Dodez* case (329 U. S. 338) should not conceal from this Court the similarity of the situation and the facts in these cases.

The analogy made by the Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, between these cases and the case of shooting across a state line in venue cases in unfounded. There also is no similarity between these cases and cases involving use of the mails to defraud, shipment of impure food and other similar offenses. Such acts relied upon by the court below were affirmative acts that pass from one jurisdiction to another. Here the nonaction of the selectees did not go outside the districts where the local boards are located.

The cases involving failure to file income tax returns and the refusal to file reports with administrative agencies are likewise not in point. These are relied upon in *United States* v. *Johnston and Sokol,* 227 F. 2d 745, 747, 748. In those cases the administrative agency that issued the order, or in whose behalf the order was made by an act of Congress, was located in the district where each prosecution was brought. The location of the administrative tribunal in these cases is in a district other than where the prosecution was brought.

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, 748, relies on the cases involving prosecution for nonsupport of children. These cases are not in point. The obligation to support children is entirely transitory. It follows the children wherever they may go. The nonsupport cases are peculiarly distinguishable from the situation in cases of this sort. (See 6 Stanford L. Rev. 709 (1954)) The nonsupport cases involve a question of venue between counties in a state. The nonsupport cases do not involve jurisdiction problems such as those presented here under Article III of the Constitution and the Sixth Amendment. Here the jurisdic-

tional problem goes back to the basic objection to the abuses practiced by the British before the Revolutionary War —not counties but districts, states and countries. The non-support cases do not involve such jurisdictional problems made here by the Constitution.

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol,* 227 F. 2d 747, 748, relies on *Regina* v. *Milner,* 2 Car. & K. 309, 175 Eng. Rep. 128 (1846). In that case, which is in point, the defendant was ordered to appear before a bankruptcy court in Birmingham. The criminal court where the bankruptcy court was located had jurisdiction. This supports the proposition that the court where the local board in located has jurisdiction. In that case the defendant argued that it was the place of his residence that determined the venue. The registrants in these cases do not say that it is the place of residence that fixes jurisdiction. It is the place where the offense was committed, the refusal occurred, which is where the local boards are located, that prescribes it.

The argument of the Government that *United States* v. *Patteson,* 10th Cir., — F. 2d — (Jan. 19, 1956), is based on an erroneous assumption is incorrect. It is said that the Court of Appeals for the Tenth Circuit hinged its decision upon the place where the statement of refusal was made or the letter of defiance was directed to the local board. It is the act of refusal to take the next step that determines the place of the offense and not the subsidiary or evidentiary statement of declaration that determines the issue. A registrant may violate the Act by refusing to take the step from the local board forward to the hospital even without declaring his intent either orally or in writing. The Court of Appeals for the Tenth Circuit did not thus narrow its holding.

The argument of the Government that the omission of the word "refusal" from 50 U. S. C. App. § 456 (j) is crucial entirely overlooks Section 12 (a) of the Act which is determinative. Section 6 (j) is merely declaratory. It em-

phasizes that the conscientious objector is a violator of the law as well as anyone who refuses to comply with local board orders. Section 12 (a) (50 U.S.C. App. § 462 (a)) uses the word "refuse" as well as the words "fail" and "neglect." This sanctions clause of the Act is the one that is involved here, to determine jurisdiction, and not the declaratory clause of Section 6 (j). Moreover, Section 6 (j) of the Act does not limit the provisions of Section 12 (a).

The suggestion is made by the Government that it is necessary to report to the hospital in order to exhaust administrative remedies. The Government then jumps to the unsupported conclusion that, since the registrant has not exhausted his administrative remedies at the local board, the place of refusal, the jurisdiction must necessarily be at the place where the work is to be performed. Administrative remedies are exhausted long before the conscientious objector is ordered to go to the hospital. He is given an armed forces physical examination before the order to do civilian work issues. It is this examination that completes the selective process. (*Dodez* v. *United States*, 329 U.S. 338 (1946); see *United States* v. *Thomas*, E. D. Ill., 124 F. Supp. 411 (1954).) Even though the registrants failed to exhaust their administrative remedies, which the Government erroneously claims, such issue is wholly irrelevant to the question of jurisdiction. Venue here is based on where the refusal took place irrespective of any supposed failure to exhaust administrative remedies.

The Congress of the United States has not specifically fixed venue in cases of this kind. Section 12 (a) of the Act (50 U.S.C. App. § 462 (a)) gives jurisdiction to the district court wherever the refusal took place. The court must depend on the general law of venue rather than specific provisions of the Act to determine the place of trial. The vicinage of trial is always determined with a leaning toward the advantage of the citizen under Article III to the United States Constitution and the Sixth Amendment, rather than pulling away from it. The construction "should go in the

direction of constitutional policy even though not commanded by it."—*United States* v. *Johnson*, 323 U. S. 273, 276, 279 (1944).

The place of refusal determines the jurisdiction. The step in the selective process that the selectees in these cases refused to take began in the districts where the local boards are located. The refusal of each to proceed with this link of the chain occurred in the districts where the local boards are located. The offense in each of these cases was, therefore, committed in the district where the local board was located. This holding is commanded by the Constitution, Article III, Section 2, and the Sixth Amendment.

United States v. *Johnston and Sokol*, 3rd Cir., 227 F. 2d 745 (Dec. 1, 1955), should, therefore, be reversed and *United States* v. *Patteson*, 10th Cir., — F. 2d — (Jan. 19, 1956), should be affirmed.

ARGUMENT

The offense in each case was committed in the district where the local board was located because it was there that each selectee refused to take the next step in the Selective Service process by proceeding to the hospital and, since no refusal or act of omission or commission was committed by each selectee in the district where the hospital was located, such district in each case did not have jurisdiction because of the mandate of the United States Constitution, Article III, Section 2, and the Sixth Amendment.

Article III, Section 2, of the United States Constitution provides in part as follows:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . ."

The Sixth Amendment to the United States Constitution reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Some of the founding fathers who wrote the Constitution were authors of grievances expressed in the Declaration of Independence against the British Government. The greatest grievance that triggered the Revolutionary War, which set off the shot heard around the world, was the British practice of taking American colonists from America to England and there putting them to trial—over 3,000 miles from the place where the offense was committed. From Massachusetts to Georgia the colonists protested against this outrageous practice. They maintained that they could be tried only by a jury of the vicinage.—Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197-198, 207-215 (1909); Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944).

A reading of the Article and the Amendment shows that exclusive venue in the district where the crime was committed is a concomitant of the right of trial by jury. The right is double-barreled. One should not be fired without the other. The trial of a crime in a district other than in the place where it was committed defeats the right of trial by jury contemplated by the framers of the Constitution. The authors of Article III and the Sixth Amendment had in mind the prerogative of the people of England stated in the Magna Charta concerning the right of trial by jury. *Jury trial* in England from time immemorial contemplated *a jury of the vicinage*.

A jury taken from a district other than where the crime was committed is not a jury of the vicinage. The authors of the Constitution, Article III and the Sixth Amendment, had in mind these ancient English heritages when they guaranteed the right of trial by a jury of the vicinage. It is because of this dual nature of the right that we find in the Constitution the right of trial by jury mentioned in the same sentence with the right of trial in the district where the crime was committed.

The right of trial by jury of the vicinage was discussed in *State* v. *Albee*, 61 N. H. 423 (1881). In that case Justice Smith, speaking for the court, said:

> "... Men who had enjoyed this protection under the British crown would not be likely to surrender it after engaging in an exhaustive war for seven years to establish their independence. One of their grievances was the trampling under foot of the time-honored principle that trials for crime must be by a jury of the vicinage."—61 N. H. 427-428.

In *Commonwealth* v. *Parker*, 19 Mass. (2 Pick.) 549 (1824), Chief Justice Parker for the Supreme Judicial Court of Massachusetts said that the constitutional mandate of the right of trial by jury from the vicinage—

> "... is merely declaratory of the sense of the people, that the proof of facts in criminal prosecutions should be in the vicinity or neighborhood where they happen. ... This being the state of things at the time of the adoption of the constitution ... it may well be supposed that the wise men who framed the declaration of rights, when they proposed to the people to declare, that 'in criminal trials, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen,' intended to hold out a caution to all future

legislatures to regard this principle in their laws concerning crimes and punishments . . ."—19 Mass. (2 Pick.) at pages 552, 554.

In 1909 Mr. Justice Connor of the Supreme Court of North Carolina in his article, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197, 215 (1909) said:

> ". . . If, as many thoughtful men think, our criminal laws are either so defective, or so weak in their administration that radical changes should be made, it would be wise to remove doubt from constitutional provisions, so that legislative action will not conflict with them. If we have outgrown Magna Carta, and limitations on government should be removed and new modes of trial, with more expeditious and less restrictive criminal procedure should be established, let the Constitutions be so amended that the Courts will not find themselves compelled either to construe them away or invalidate legislation. While ours is a government by the people, of the people and for the people, it is an equally important truth that the people govern by agencies of their own creation, subject to the limitations imposed upon them by the supreme law, beyond which they should neither be required nor permitted to go, certainly if the law is essential to stability of the State and the safety of the citizen."

The Court of Appeals for the Third Circuit in *United States* v. *Johnston and Sokol*, 227 F. 2d 745 (Dec. 1, 1955), disregarded completely the harshness and injustice that a defendant in a case of this sort can be put to. The court failed to pay attention to the fact that a local board on the eastern coast of the United States could order a registrant living in the eastern states to report for civilian work on the west coast or in Hawaii or Alaska. He could then be

prosecuted in those remote places where he had never gone.

The court in the *Johnston* case (227 F. 2d 745) overlooked the fact that the Government would be in a position to transport its witnesses all the way across the continent or to any other place, but the defendant—in most if not in all cases—would be absolutely deprived of witnesses to corroborate his defenses or prove his good character. When the Court of Appeals for the Third Circuit in the *Johnston* and *Sokol* cases (227 F. 2d 745) gave the Government such power in cases such as these, it created an alien principle that gives rise to a repetition of the grievance complained of by the American colonists against the British crown prior to the American Revolution.

To emphasize the error, consider the following: Under the law a conscientious objector can be ordered to do work outside the continental United States and its possessions. The conscientious objector may be sent anywhere in the world where a soldier can be sent. He may be ordered to perform alternate civilian work any place in the world. Assume now that the conscientious objector is ordered to do civilian work in lieu of induction in Japan or Korea. Then, extending the reasoning of the Court of Appeals for the Third Circuit, the only federal court in the United States or its possessions that would have jurisdiction to prosecute, in the event he refused to report for and perform the civilian work, would be the district where he was found—which in the *Johnston* and *Sokol* cases is the Western District of Pennsylvania. Certainly the authors of the Constitution did not intend the recrudescence that a logical extension of the doctrine manufactured by the Third Circuit makes.

The Court of Appeals for the Third Circuit failed to grasp the clear distinction between the different offenses that may be committed under the Universal Military Training and Service Act. It ignored the fundamental proposition that the Selective Service process is a connected series of different steps, the violation of any one of which constitutes a separate offense.—*Falbo* v. *United States*, 320 U. S. 549,

553, 554 (1944); *Billings* v. *Truesdell*, 321 U. S. 542, 553, 554, 556, 558 (1944).

The court entirely overlooked the fact under the regulations and in the records in the *Johnston* and *Sokol* cases (No. 643) that the selectees complied with one step. They reported at their local boards as commanded. They were then ordered to take the next step. This was to start traveling from the local boards in the Western District of Pennsylvania to the hospitals in the Eastern District of Pennsylvania. Johnston and Sokol refused to move out of the district. No compliance with the orders of the local boards was made by them. They refused then and there at the local boards to go farther.

It was the balking of Johnston and Sokol in the Western District that constituted the offenses. The refusal to take the next, different but integrated, step in the selective process took place in the Western District of Pennsylvania. The Court of Appeals for the Third Circuit ignored completely the fundamental proposition that such refusal to take the step could not and did not extend outside the Western District of Pennsylvania. The court in *United States* v. *Johnston*, 227 F. 2d 745, in considering the connected series of steps overlooked completely the vital link in the process: traveling from the local boards in the Western District of Pennsylvania to the hospitals in the Eastern District of Pennsylvania. This could not and would not be completed unless and until the selectees traveled to the hospitals and accepted the assignments. The Court of Appeals for the Third Circuit overlooked the next link, which followed the issuance of the order, in the selective process and stared down the stairway of connected steps seeing only the bottom step, at the hospitals. Instead of coming down the stairway step by step, it took one long leap from the top step to the bottom and missed the step the refusal of which to take constituted the offense.

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) defines the appropriate civilian work

that may be done by a conscientious objector. 32 C. F. R. § 1660.20 (a) provides for the conscientious objector to submit three types of civilian work to the local board, from which it is to determine one that is appropriate. 32 C. F. R. § 1660.20 (b) provides for the local board to submit three types of civilian work to the registrant in the event the registrant fails to submit three types of work that he offers to perform, or if the local board is not satisfied with the three types of work he submits to it. C. F. R. § 1660.20 (c) provides for a hearing before the board attended by a representative of the state director and the registrant, for the purpose of reaching an agreement in the event the registrant and the board have not theretofore agreed upon the type of work to be done. 32 C. F. R. § 1660.20 (d) provides for the local board, upon approval of the Director of Selective Service, to order the registrant to perform civilian work.

32 C. F. R. § 1660.21 (a) provides that no registrant shall be ordered to perform civilian work "in the community in which he resides" unless the local board finds it is "desirable in the national interest."

32 C. F. R. § 1660.30 provides as follows:

> *"Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall

be reported to the Department of Justice for prosecution."

The significance of the difference between failing to report for work at the place assigned and reporting there and thereafter refusing to perform the work is emphasized in 32 C. F. R. § 1660.31 (a). If a registrant is ordered to do work at a hospital but refuses to report for work, then his local board file remains under the jurisdiction of the local board and the state director of the state where the local board is located. Should the conscientious objector report at the hospital to perform the work, then the file is transferred to the state director of the state where the place of performance of the civilian work is located.

Had petitioners Johnston and Sokol resided, and the boards been located, in a state other than Pennsylvania, then the files would never have been under the jurisdiction of the Pennsylvania State Director. The reason the State Director of Pennsylvania had jurisdiction of the files was that petitioners resided in the State of Pennsylvania and the boards were located there. The State Director of Pennsylvania did not get jurisdiction of the files by reason of petitioners' reporting at the state hospitals to do the work.

In the case of Patteson the local board file was never transferred from the State Director of Oklahoma to the State Director of Kansas. This failure to act was because Patteson never left Oklahoma City and checked in at the state hospital at Topeka. Failure to transfer the draft board file from the Oklahoma Director of Selective Service to the Kansas Director of Selective Service was a distinction in jurisdiction between the local board and the hospital. The failure to make this transfer of the file in the *Patteson* case proves that the hospital in this case never had any jurisdiction over the selectee because he did not report to the hospital and accept the assignment. This distinction, practiced by the Selective Service System, should guide this Court in determining that the hospitals

had no jurisdiction. The district courts in the districts where the hospitals were located likewise had no jurisdiction.

The statute, the regulations and the above-cited cases show that there are separate offenses. There is the offense of failing to report for civilian work. This offense is committed even though the registrant appears at the local board and states his determination not to perform the civilian work. There is the additional and separate offense of refusing to perform civilian work after having reported for such work at the place where it was ordered to be performed. Where the registrant fails to proceed to the place of performance of such work he has committed an offense of failing to report for such work. The offense is obviously committed in the district where his local board is located, and where he refuses to go farther.

The other offense is committed at the place where the civilian work is ordered to be performed. This is committed where the registrant reports for work but thereafter refuses to perform the work. This offense is committed in the district where the place of work is located.

The two offenses are distinct and separate. The federal district court where the board is located has no jurisdiction over the offense of refusing to perform civilian work where the registrant has reported at the place of work and refused to do the work, as in the case of the defendant in *Gibson* v. *United States*, 329 U. S. 338 (1946). The district court where the place of work is located has no jurisdiction over the offense where a registrant reported to the local board or did not proceed to the place of work, as in the cases of *Dodez* v. *United States*, 329 U. S. 338 (1946), and *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947).

In *Dodez* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to go to a civilian public service camp at Medaryville, Indiana. His local board was located in Ohio. He wrote the local board stating he would not

report as ordered. He failed to report. He was prosecuted in the Northern District of Ohio, and not in Indiana.

In *Gibson* v. *United States*, 329 U. S. 338 (1946), the registrant was ordered to report to a civilian public service camp in South Dakota. He registered with a local board at Eldorado, Arkansas. After reporting at the camp in South Dakota he departed without leave. He was indicted and prosecuted in the District of South Dakota.

In *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), it was held that, when a registrant reported at his local board and stated his refusal to proceed to a civilian public service camp to perform work of national importance, the registrant committed the offense of failing to report to his board to do work of national importance. In that case the defendant registered with his local board in Scott City, Kansas. He was thereafter ordered by the local board to report for work of national importance and proceed to the civilian public service camp at Lapine, Oregon. The defendant was indicted, prosecuted and convicted in the District of Kansas. His conviction was affirmed by the Court of Appeals, which constituted an implied finding that the District of Kansas had jurisdiction of the offense.

If each selectee in these cases had been ordered to report for induction into the armed forces and refused to report for induction there would be no doubt that jurisdiction would be fixed in the district courts where the local boards are located. Had Johnston and Sokol been ordered to report for induction in Philadelphia and reported at such induction center and then refused to submit to induction, there would be no doubt that the United States District Court for the Eastern District of Pennsylvania would have jurisdiction. Had petitioners Johnston and Sokol been ordered under the 1940 Act (50 U. S. C. App. §§ 301-318) to report to their local boards and to do work of national importance in a civilian public service camp in the Eastern District of Pennsylvania, and thereafter failed to proceed to such civilian public service camp, there would be no

doubt that jurisdiction would be in the United States District Court for the Western District of Pennsylvania. (*Dodez* v. *United States*, 329 U. S. 338 (1946)). But assume that Johnston and Sokol had proceeded to the civilian public service camp in the Eastern District of Pennsylvania, and there refused to perform the work, and were indicted therefor, then there would be no doubt that the Eastern District of Pennsylvania would have jurisdiction.—*Gibson* v. *United States*, 329 U. S. 338 (1946).

The Government attempts to distinguish *Dodez* v. *United States*, 329 U. S. 338 (1946). It is said that the difference makes the distinction. The Selective Training and Service Act of 1940 (50 U. S. C. App. §§ 301-318), it is said, provided for travel pay which was picked up at the local board under the regulations promulgated pursuant to the 1940 Act. It is argued that because travel to the hospital under the Universal Military Training and Service Act (50 U. S. C. App. §§ 451-470) is paid by the selectee, such is a distinguishing factor. This is a distinction without a difference. The link in the selective process from the local board to the hospital is not determined according to who pays the travel expense.

In each of these cases the selectees were ordered to report to the local boards and then to proceed from there to the hospitals with the assignment of work. This showed that there were two separate but integrated links in the chain. The link of travel to the local board and the link of travel from the local board to the hospital were different. It is plain that there was the duty to take the two integrated steps irrespective of whether the travel pay was covered by the Government or not. The result in the case of *Dodez* v. *United States*, 329 U. S. 338 (1946), did not pivot on the fact that the Government paid the travel expense. It turned on one link in the chain ending at the local board and the other link beginning at the local board and ending at the civilian public service camp.

The argument of the Government about the travel pay

making the situation between the process under the 1940 Act and present act different is without substance. It borders on the frivolous. Under both acts the offense was committed when the registrant refused to travel from his home or the board to the civilian public service camp or to the hospital, regardless of who pays the travel costs.

There is no difference whatever between the offense of failing to report for civilian work under the Universal Military Training and Service Act and the offense of failing to report for civilian work of national importance under the 1940 Act (50 U. S. C. App. §§ 301-318). The offense is committed under each act by the failure to leave home and report at the place of work and enter upon the performance of such civilian work. The offense of leaving a civilian public service camp under the 1940 Act is the same as the offense of leaving a place of civilian employment under the present Act (50 U. S. C. App. §§ 451, *et seq.*). Under both acts the jurisdiction of the district court is to be determined by the place of the offense, that is, the place where the camp or hospital is located. Under both acts the place of the offense of failing to report for work is in the district where the local board is located. Under both acts the jurisdiction of the offense of leaving civilian work is in the place where such work is ordered to be performed.

Since the district court where the board is located has jurisdiction of the offense of failing to report for induction in the armed forces, when the registrant fails to proceed to the induction center (*Falbo v. United States,* 320 U. S. 549 (1944)), then by force of the same reason, the same court would have jurisdiction over the failure of a registrant classified as a conscientious objector to proceed to the place of work. (*Dodez v. United States,* 329 U. S. 338 (1946)) The offense is identical. It is committed in the same district, namely, the place where the order to report was given and compliance therewith refused by declining to leave the board and go to the place designated.

In the opinion written by Judge Goodrich for the Court

of Appeals in the *Johnston* and *Sokol* cases (227 F. 2d at p. 747), the court likened the refusal to comply with the draft board order to the familiar illustration made in venue cases of shooting across a state line and killing a person in the adjoining state. The court also simulated the refusal to comply with the draft board order to cases of publication of libelous words in more than one jurisdiction, false representation by means of mail delivered in another state, shipment of impure foods from one state to another and a solicitation in one state by a person made to an employee in another state to violate his official duties.

These illustrations relied on by the court in the *Johnston* and *Sokol* cases and claimed to be analogous are not at all analogous. They are obviously distinguishable. The acts were *affirmative* acts. They involved offenses of misfeasance and malfeasance passing from one jurisdiction to another. They did not involve the distinctly different situation here, which is a refusal to act, or nonaction. The case here involves no overt act committed in one district that extends into another.

The analogy drawn by Judge Goodrich turns to the nonaction of Johnston and Sokol in refusing to comply with the draft board orders. (227 F. 2d 748) It is likened to the refusal and failure of a person to file reports and returns in different administrative agencies. The court also likens the nonaction of the registrants to a refusal to comply with an order to appear before a legislative committee. (227 F. 2d 748) All the instances relied on by the court below in these cases are not in point. They involved orders issued by the tribunals located in the district where the prosecutions were brought. But these cases do not involve orders issued by tribunals in the district where the prosecution was brought.

The cases relied on in the opinion of the court in the *Johnston* and *Sokol* cases do not support the conclusion reached. They are also patently distinguishable. The tri-

bunals issuing the orders in these cases were located in a district other than that where the prosecution was brought. It is the source of the authority or the order that determines the place of violation of the law or the place of the offense. Since all the cases relied on in the *Johnston* and *Sokol* cases involved orders issued by a tribunal in the district where the prosecution was brought and not orders issued by a tribunal outside the district, as in these cases, such cases are, upon their face, not in point and do not support, in any sense of the word, the conclusion reached by the court below in these cases.

The only two cases relied on by the court in its opinion (227 F. 2d 748) that are seemingly in point are *State* v. *Peabody*, 25 R. I. 544, 56 A. 1028 (1904), and *State* v. *Yocum*, 182 Ind. 478, 106 N. E. 705 (1914). (See footnote 14.) But these two cases are not in point. They involve the failure to support children contrary to law. It may seem that these two cases are analogous to the refusal to comply with the local board order. But they are distinguishable.

In those cases there was involved the liability to support children, which followed the children wherever they went in the state. It was a transitory obligation. (6 Stanford L. Rev. 709 (1954)) The obligation here is not transitory. The orders were issued in the Western District of Pennsylvania. The refusal to comply with the order issued in the Western District of Pennsylvania is the basis for the offense in each case. The obligation began in the Western District of Pennsylvania and the order was breached in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. But assuming that the *Peabody* and *Yocum* cases are in point, then these two cases relied upon by the court below in its opinion are challenged as being erroneous.

Neither the *Peabody* nor the *Yocum* case dealt with the Sixth Amendment. Indeed the courts did not discuss the constitutional right of the defendants to be tried in the district where the offense was committed. The courts

merely dealt with a common law question of venue. The courts did not have to consider the basic question of the lack of jurisdiction resulting from the mandate of the Sixth Amendment, relied upon by the petitioners here. The third circuit, therefore, fatally erred when it relied on the *Peabody* and *Yocum* cases as authority for the conclusion it reached in these cases.

Judge Goodrich said (227 F. 2d 748): "We think what is being prosecuted here is the failure of these defendants to do what the law required them to do." This statement is proper, but the court circumnavigates the next question and leaves a vacuum by concluding that the refusal took place at the hospital. But the refusal in the *Johnston* and *Sokol* cases did not take place at the hospital. The refusal there took place in the Western District of Pennsylvania, where the orders were given. Here Johnston and Sokol refused to comply with the orders in—and only in—the Western District of Pennsylvania. They did not violate any order at the hospital in the Eastern District of Pennsylvania. There was no refusal to obey any order there.

In footnote 13 of its opinion (227 F. 2d 748) the court cites the English case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846), which is also cited in *United States* v. *Anderson*, 328 U. S. 699, 705 (footnote 14). The offense there was failure to appear before the district court in Birmingham that had issued the order. This case is analogous to failure to appear before a local board that had issued the order. It is identical with the factual situation here. The failure to appear before a local board to proceed to perform the civilian work, as was held in *Jeffries* v. *United States*, 10th Cir., 169 F. 2d 86 (1947), is the offense committed, and the offense was committed in the cases at bar in the Western District of Pennsylvania and not in the Eastern District of Pennsylvania. The case of *Regina* v. *Milner*, 2 Car. & K. 309, 175 Eng. Rep. 128 (1846) (227 F. 2d 748) also appears in 9 *Halsbury's Laws of England* (2d Ed.) at page 66, fn. o.

The English cases are not authoritative. The English law is not restricted by a constitutional mandate such as that expressed in the United States Constitution, Article III, Section 2, and the Sixth Amendment. There are other objections to the English cases that are made manifest in a more detailed discussion to be found in Connor, "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197 (1909), and Blume, "The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue," 43 Mich. L. Rev. 59 (1944).

Apparently the court in *Regina* v. *Milner*, *supra*, had the important question of "the convenience of the court, the witnesses, and the person accused" which Stephen emphasized in his works on the criminal law of England. (1 Stephen, *History of the Criminal Law of England* 278 (1883)) Whatever may have been the common law in England it has now been covered extensively by statute which has completely relaxed the common law rule as to venue. (9 *Halsbury's Laws of England* (2d Ed.) 70-71) This statutory view clarifies the law in a manner contended for by Stephen.

> ". . . It is obvious that all courts otherwise competent to try an offence should be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offence was committed would be the most convenient place for the purpose."—1 Stephen, *History of the Criminal law of England* 278 (1883).

Under this rule stated by Stephen it is manifest that the most convenient place for the purpose of trial in these cases would be only in the district where the local boards are located. The local board is usually located in the same district where the defendant resides.

All of the witnesses in prosecutions of these cases usually come from the district where the local board is located and the defendant resides. The facts and the controversy between the registrant and the local board never occur in the district where the hospital is located. They are better known and more conveniently established by witnesses in the district where the defendant resides and his local board is located. It is plain, therefore, that a rule of convenience would require that the prosecution in these cases be in the districts where the local boards are located and the selectees resided.

The case of *New York Central & H. R. R. Co.* v. *United States*, 2d Cir., 166 F. 267 (1908), cited in footnote 18 (227 F. 2d 748), is likewise not in point. The failure to file a document at a place fixed by statute is the same as failure to report before the local board for the performance of civilian work and not the failure to report at the place where the work is located.

United States v. *Van Den Berg*, 7th Cir., 139 F. 2d 654 (1944), relied upon in footnote 20 (227 F. 2d 748) is not in point. The holding in that case supports the position taken by petitioners here, that jurisdiction is to be determined by the place where the order is given. In that case the local board was located in the Eastern District of Wisconsin, and the defendant was registered in the Eastern District of Wisconsin. There the court held that the Eastern District had jurisdiction and such holding is directly in point. The other cases cited in footnote 20 are the same factually and also do not support the court's conclusion.

But in the same footnote and not cited as authority for the holding by the court below is the case of *United States* v. *Chiarito*, 69 F. Supp. 317 (D. Or. 1946). That case is directly in point here and is more in consonance with justice, fair play and the spirit of the Sixth Amendment. The opinion was written by Judge James Alger Fee, who is now a member of the United States Court of Appeals for the Ninth Circuit.

One cannot help but be persuaded that the reasoning in the *Chiarito* case is basically more sound than the opinion of the court below in these cases. The reasoning of Judge Fee is cogent. This Court should consider what Judge Fee has to say on this question (69 F. Supp. at pages 321-325). This Court should adopt *United States* v. *Patteson*, 10th Cir., — F. 2d — (Jan. 19, 1956), which held the same as *United States* v. *Chiarito*, 69 F. Supp. 317, and set aside the decision in the *Johnston* and *Sokol* cases (No. 643).

The libel cases relied on in *United States* v. *Johnston*, 227 F. 2d 747, 748, are weakened by the *Matter of Dana*, 7 Ben. 1. In that case Judge Blatchford in the United States District Court for the Southern District of New York quashed a warrant issued by a federal commissioner for the arrest of Dana in New York. Charles A. Dana was the editor of the New York *Sun*. He published an article reflecting upon the public conduct of a federal official in Washington, D. C. The newspaper was widely circulated. Copies of the paper were distributed in the District of Columbia. A complaint was filed before a police magistrate of Washington, D. C. Judge Blatchford treated the proceedings as beyond the jurisdiction of the police magistrate because of want of jurisdiction. Judge Cooley in his treatise, *Constitutional Limitations*, Vol. 1 (Boston, Little, Brown and Co., 1927) (8th Ed.), said as follows (page 677):

> ". . . Matter of Dana, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances compained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a Federal officer to every territory into which his paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them."

In the *Patteson* case (No. 704) the Government takes the position that he has been charged with the offense of failing to report at the hospital located in Topeka, Kansas, and that such allegation alone is determinative. The indictment so charged him. [RP 1] The motion to dismiss and the supporting affidavit show that Patteson reported to his local board and there refused to go farther, as did Johnston and Sokol. This Court will look through the gossamer allegation and see the true facts and thus avoid a distinction without a difference in these cases.

The Government also takes the position that the Court of Appeals for the Tenth Circuit in the *Patteson* case hinged its decision upon the statement by Patteson to the board that he refused to go farther. This factitious position of the Government ought not to mislead this Court. The decision of the Court of Appeals for the Tenth Circuit was based upon the place where the refusal took place. It is the place of the refusal rather than the place where the statement of refusal is made that is determinative. The making of the statement of refusal by the registrant is mere surplusage. It is evidentiary of the basic fact of refusal. It is the act of refusal and not the statement of refusal to go farther that makes the offense.

The Government takes the position that Section 6 (j) of the Act (50 U. S. C. App. § 456 (j)) emphasizes the *neglect* of the registrant and says nothing about the *refusal* to act constituting an offense. The omission of the word "refusal" in Section 6 (j) of the Act does not at all limit the Act. It does not show an intent on the part of Congress to provide some special venue provision. When Congress omitted to use the words "refuse" or "refusal" it did not have in mind venue or jurisdiction of the offense. Section 6 (j) of the Act is merely declaratory. It is a statement that conscientious objectors who violate the law are equally as guilty as other registrants who refuse to comply with local board orders. Section 12 (a) of the Act (50 U. S. C. App. § 462 (a)) is determinative. This part of the Act

authorizes prosecutions of all persons who "fail or neglect or refuse to perform any duty" under the Act at the place where the refusal took place.

The registrants in these cases did not neglect to report but they refused to report. The indictment in the *Patteson* case charged that Patteson "did knowingly and willfully refuse, neglect and fail to report at the Topeka State Hospital." [RP 1] The indictments in the *Johnston* and *Sokol* cases charged that they did "knowingly neglect to perform a duty" imposed upon them. [RJ 3, 4]

The Court should not permit the Government to confuse the issue by omitting the word "refuse" and emphasizing the word "neglect," both of which are used in the Act. Whether the registrant refused, neglected or failed to perform the duty is not determinative. The important thing is: Where did the omission take place, whether there is a refusal or a neglect?

To determine where the omission occurred it is necessary for the Court to keep in mind the connected links in the chain of the selective process. It is the failure or refusal to take the next step in the process that constitutes the offense. Whether the selectees in these cases "refused" or "neglected" to perform a duty under the Act is not crucial. It is where did such omission take place. The failure to act took place where the next step required to be taken began.

In all of these cases the next step began at the local board and in the district where the local board was located and ended at the hospital. This step was not taken by any of the selectees in these three cases. It is obvious that the offense, therefore, in each case occurred where the nonaction took place. In each of these cases the nonaction took place when the selectee neglected, failed or refused to take the next step required of him under the Act. This was, of course, in the district where the local board was located.

The Government argues that, unless the selectee reports

at the hospital, he does not exhaust his administrative remedies. It relies upon *United States* v. *Sutter*, S. D. Cal., 127 F. Supp. 109 (1954). This is a false position. The holding in the *Sutter* case, *supra*, is erroneous. It ignores and defies *Dodez* v. *United States*, 329 U. S. 338 (1946).

There is no act or process at the hospital that would result in any relief to the registrant. At the hospital there are no physical examinations. The hospitals do not perform any function in the selective process. Prior to the issuance of the order to report for civilian work at the hospital the registrant has already had an armed forces physical examination. This final examination determined once and for all his physical and mental acceptability for civilian work. No further examination is required at the hospital as a part of the selective process. Only one examination is given. That is the armed forces physical examination which each of the selectees in these cases had been given long before the order to do civilian work issued. (*United States* v. *Thomas*, E. D. Ill., 124 F. Supp. 411 (1954); see *Operations Bulletin No. 70*, Selective Service System, Washington, D. C., June 19, 1952, Appendix B to this brief, *infra*, pages 45-47.) The position the Government takes on this point about *Falbo* v. *United States*, 320 U. S. 549 (1944), being applicable is contrary to *Dodez* v. *United States*, 329 U. S. 338 (1946).

The question of failure to exhaust administrative remedies, even if it were applicable here, is not determinative of the question here involved. This is a question of jurisdiction: Where did the offense occur? The issue is not: Did the selectee fail to exhaust his administrative remedies? The Court is not here concerned with whether the selectee will have a defense to the indictment. The issue here is not whether the defendant in the trial court may or may not challenge the validity of the draft board order in defense to the indictment. (*Falbo* v. *United States*, 320 U. S. 549 (1944); *Dodez* v. *United States*, 329 U. S. 338 (1946)) The point to be decided is pure and simple: Did

the refusal or willful failure to comply with the draft board order take place in the district where the draft board was located or in the district where the hospital was located?

The specious argument of the Government ought, therefore, to be disregarded. It is unreasonable and unfair and imposes a harsh burden upon the defendants in criminal cases of this kind so as to give jurisdiction to the district court where the offense was not committed. It is not the location of the place of work that counts, any more than the location of the place where a registrant is ordered to submit to induction would be determinative, if he did not report at such place for induction. It is the place where the offense was committed that gives judisdiction to the court. In all cases where the registrant reports to the local board, and then refuses to go any farther, or declines even to report, either to a place where he is ordered to perform civilian work or to a place where he is ordered to submit to induction, the offense is still committed at the place where the local board that issued the order is located.

Article III and the Sixth Amendment to the Constitution require that defendants in criminal cases be tried in the district wherein the crimes were committed. It is submitted that the *locus delicti* of the alleged crimes in the *Johnston* and *Sokol* cases is in the Western District of Pennsylvania and in the *Patteson* case is in the Western District of Oklahoma. The above analysis of the nature of the crime and its constituent elements fully discloses this.

The position that the selectees take here is supported by *United States v. Johnson*, 323 U. S. 273 (1944). In that case the defendant was indicted for violating the Federal Denture Act (18 U. S. C. A. §§ 420 (f)-420 (h)). The information was filed in the District of Delaware and charged the defendant with depositing in the mails at Chicago for delivery in Delaware certain dentures, in violation of the Delaware laws, contrary to the Federal Denture Act. The

information was quashed on the ground that the defendant could be prosecuted only where the dentures were deposited in the mails. The court pointed out that, in the absence of specific venue provisions giving the Government a choice of trial, the place of trial should be fixed to be consistent with "the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."—323 U. S. at page 276.

The Court also pointed out that, where a defendant is prosecuted in a place other than that of his residence or the place of commission of the offense, he would be subjected to "serious hardship of defending prosecutions in places remote from home." The Court said that such practice of allowing the Government to select places of prosecution remote from the place where witnesses are located gives rise to the "temptation to abuses, already referred to, in the administration of criminal justice." (323 U. S. at page 276.) The attention of the Court is directed also to the concurring opinion of Mr. Justice Murphy in that case (323 U. S. at page 279).

Justice Connor, in his article "The Constitutional Right to a Trial by a Jury of the Vicinage," 57 Univ. Pa. L. Rev. 197 (1909), said:

> ". . . It is true that it is held by some Judges, theoretically, that in the absence of express limitations upon the power of the Legislature, the Courts cannot question the validity of its enactments. If this view be correct, the decisions to which reference has been made, and all others of like import are wrong, and the 'trial by jury,' provided for in the Constitutions, both State and National, means only an indictment and trial by such a number of jurors as Congress or State legislation may prescribe, and, by the same canon of interpretation, a verdict of guilty may be ren-

dered by a majority, or for that matter, a third or fourth of the jurors, if the Legislature so provides. This would lead to the conclusion that a jury of the vicinage meant such vicinage as the Legislature may prescribe, even to the extent of the entire State, provided that, in some form the right to demand indictment by a grand jury and trial by a petit jury, is preserved."—Page 213.

". . . Doubtful governmental powers lie dormant until some unexpected emergency arises when, either for the public safety or, to gratify party or factional passions, they are invoked by the enactment of statutes hastily drawn by men guided by fears or interests, rather than by a recognition of well-settled principles of constitutional law. When their enforcement is resisted, appeals are taken to the Courts, which must pass upon them in the light of authoritative decisions and historical truth. The public mind, at such times, is disturbed by existing and it may be transient conditions or appeals to passion rather than reason. If the Judges find it their duty to disappoint the demand for speedy trials, at the expense of the right of the citizen, it is easy to find their reasons to be 'technical,' or obstructive of the will of the people. Our own history is not without its lessons in this respect. In times of party rage and sectional hatred, statutes were proposed, and some enacted, but little less contrary to the spirit, if not the letter, of the Constitution than that of 35th, Henry VIII."—Pages 214-215.

If the Government is given the power it seeks in cases such as these, then there will be an end to many possible defenses that a conscientious objector might have under the law. It is significant that, in cases where a registrant is ordered to report for induction at a place too distant

for his convenience, he may have the order to report for induction changed and transferred to a place nearer and more convenient to him. (32 C. F. R. § 1632.9) This regulation makes it impossible for a registrant who is ordered to report for induction into the armed forces to be mistreated and denied the right of trial in a district court convenient to him. Also the registrant classified as a conscientious objector is entitled to be tried in the district court where the local board is located. He may not be tried in some faraway and inconveniently burdensome place to which he has never traveled and where he is wholly unknown, as also are the facts of his case.

CONCLUSION

This Court should say that the place where the omission occurred or the refusal took place should determine the place of prosecution. The Court should hold that the step in the selective process ordered by the local board to be performed in each of these cases began in the district where the local board was located. It should be held that the neglect or refusal to take the step of proceeding to the state hospital occurred in each case in the district where the local board was located.

A holding ought to be made that the offense in each of these cases was committed in the district where the local board was located and not where the hospital was situated. This suggested holding is commanded by the United States Constitution, Article III, Section 2, and the Sixth Amendment. These constitutional mandates, under the facts and circumstances of these cases, require that this Court hold that the district courts where these prosecutions were instituted, the districts where the hospitals were located, did not have jurisdiction and the district court in each of the three cases committed no error in sustaining the motion to dismiss the indictment.

The Court should, accordingly, reverse *United States* v. *Johnston and Sokol* (No. 643) and affirm *United States* v. *Patteson* (No. 704).

Respectfully submitted,

HAYDEN C. COVINGTON

Attorney for Petitioners Johnston and Sokol and Respondent Patteson

March, 1956.

APPENDIX A

Section 1660.1 of the Regulations

Section 1660.1 of the Selective Service Regulations (32 C. F. R. § 1660.1) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Definition of Appropriate Civilian Work.*—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

"(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Regulations

Section 1660.20 of the Selective Service Regulations

(32 C. F. R. § 1660.20) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides:

"*Determination of Type of Civilian Work to Be Performed and Order by the Local Board to Perform Such Work*—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of

work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

"(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Section 1660.30 of the Regulations

Section 1660.30 of the Selective Service Regulations (32 C. F. R. § 1660.30) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952) provides as follows:

"*Failure or Neglect to Obey Order to Perform Civilian Work.*—Any registrant who knowingly fails or neglects to obey an order from his local board to perform civilian work contributing to the maintenance of the national health, safety, or interest in lieu of induction shall be deemed to have knowingly failed or neglected to perform a duty required of him under title I of the Universal Military Training and Service Act, as amended. When any registrant fails or neglects to obey any such order, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution."

Section 1660.31 of the Regulations

Section 1660.31 of the Selective Service Regulations (32 C. F. R. § 1660.31) (E. O. 10328, 17 F. R. 1650, Feb. 22, 1952, except as otherwise noted) provides as follows:

"*Administration of Registrants While Performing Civilian Work.*—(a) After a registrant who has been classified in Class I-O reports in response to an order from his local board for civilian work in lieu of induction and he has been classified in Class I-W, his Cover Sheet (SSS Form No. 101) and contents shall be forwarded to the State Director of Selective Service for the State in which the work is being performed. It shall be the responsibility of such State Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provision of section 1660.21. When the registrant has satisfactorily completed this work, the State Director of Selective Service shall return the registrant's cover sheet to the local board

together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the State Director of Selective Service, the State Director of Selective Service shall forward the cover sheet to the Director of Selective Service for a determination as to whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(b) When the civilian work to which a registrant is ordered by the local board in lieu of induction is to be performed at any place outside of the continental limits of the United States, the Territories of Alaska and Hawaii, Puerto Rico, the Virgin Islands, Guam, and the Canal Zone, and the registrant has reported for such work, the local board, after classifying the registrant in Class I-W, shall forward the registrant's Cover Sheet (SSS Form No. 101) and contents to the Director of Selective Service. It shall be the responsibility of the Director of Selective Service to see that the registrant performs the work to which he has been ordered by the local board for a period of twenty-four consecutive months, unless sooner released under the provisions of § 1660.21. When the registrant has satisfactorily completed this work, the Director of Selective Service shall return the registrant's cover sheet to the local board together with a letter stating that the registrant has satisfactorily completed his work. If the registrant should fail to perform such work, or should otherwise fail to perform his duties under title I of the Universal Military Training and Service Act, as amended, during the time that his cover sheet is in the custody of the Director of Selective Service, the Director of Selective Service shall determine whether or not the registrant shall be reported to the Department of Justice for prosecution.

"(c) When the local board receives the cover sheet

of the registrant from the Director of Selective Service or the State Director of Selective Service together with the letter stating that the registrant has satisfactorily completed his period of civilian work or a written notification that the registrant has been sooner released from such work by the Director of Selective Service under the provisions of § 1660.21, the local board shall mail the registrant a certificate evidencing his satisfactory completion of and release from civilian work and shall retain him in Class I-W and identify him on all records by following his classification with the abbreviation 'Rel.' until such time as he attains an age beyond the maximum age of liability for military service."

[Paragraph (c) amended by E. O. 10420, 17 F. R. 11593, Dec. 19, 1952]

APPENDIX B

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1712 G Street Northwest
Washington 25, D.C.

[SEAL]

In Replying Address
The Director of Selective
Service
And Refer to No.
June 19, 1952

OPERATIONS BULLETIN NO. 70
SUBJECT:

ARMED FORCES PHYSICAL EXAMINATIONS FOR CLASS I-O REGISTRANTS

1. The Department of the Army has issued the attached letter dated June 2, 1952, which prescribes the procedures to be followed at the Armed Forces Examining Stations for

the mental and physical examination of Class I-O registrants and which is supplemental to Special Regulations No. 615-180-1, dated November 5, 1951, as amended.

2. The examination of Class I-O registrants will be initiated in July 1952. These registrants shall be forwarded for armed forces physical examination beginning in July 1952 in accordance with arrangements which shall be made by State Directors of Selective Service with Army Commanders or their designated representatives. Since the number of Class I-O registrants who may be ordered to perform civilian work in lieu of induction is entirely dependent upon the number of available jobs to which these registrants may be ordered, no useful purpose will be served by having a large number of them examined unless work will be available for them in the immediate future.

3. Local boards shall, so far as is practicable, select and order to report for armed forces physical examination first such Class I-O registrants who are volunteers in the sequence in which they have volunteered for civilian work contributing to the maintenance of the national health, safety, or interest and then such Class I-O registrants who are nonvolunteers in the order of their liability for service.

4. In ordering Class I-O registrants for examination, local boards shall use the Order to Report for Armed Forces Physical Examination (SSS Form No. 223) (Revised 3-18-52). None of the previous printings of SSS Form No. 223 shall be used in ordering any such registrant for examination.

5. Class I-O registrants who are forwarded to the Armed Forces Examining Stations shall be listed on a separate Physical Examination List (SSS Form No. 225).

2.

6. In forwarding Class I-O registrants for examination, all forms prepared at the local board and accompanying documents concerning such registrants which are required to be forwarded to the Armed Forces Examining Station, including the Physical Examination List (SSS

Form No. 225), shall be identified by a stamped notation "I-O" in red ink at the upper right hand corner.

7. The processing of Class I-O registrants for armed forces physical examination will be identical with that of other registrants. State Directors shall keep a separate record of the number of Class I-O registrants forwarded for examination, the number of these registrants examined and found acceptable, the number found unacceptable, and the number who fail to report. This Headquarters will request these data when required.

8. It is not necessary that Class I-O registrants be re-examined in the event they are not ordered to work within the 120 days following completion of their first mental and physical examination. However, the local board may order a Class I-O registrant for re-examination if more than 120 days have elapsed since he was examined and found acceptable for service and the local board has reason to believe that he may no longer be acceptable.

9. The armed forces physical examination is given to Class I-O registrants for the purpose of determining their acceptability for service. If found acceptable, they will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest. Any such registrants who fail to report for or submit to the armed forces physical examination shall be available to be ordered to perform civilian work in the same manner as if they had been examined and found acceptable.

LEWIS B. HERSHEY,
DIRECTOR

Attachment